

LFC Requester:**Connor Jorgensen****AGENCY BILL ANALYSIS
2016 REGULAR SESSION****WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:****LFC@NMLEGIS.GOV***and***DFA@STATE.NM.US***{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}***SECTION I: GENERAL INFORMATION***{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}**Check all that apply:*Original ☒ Amendment ☐
Correction ☐ Substitute ☐**Date** 13 February 2016**Bill No:** HJR 23**Sponsor:** Reps. Zimmerman and Little**Agency Code:** 305**Short** State Ethics Commission**Person Writing** Joseph M. Dworak**Title:** _____**Phone:** 505.827.6986 **Email** jdworak@nmag.gov**SECTION II: FISCAL IMPACT****APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

HB 80 – State Ethics Commission Act
SB 124 – State Ethics Commission Act
HJR 5 – Independent Ethics Commission, CA

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE**BILL SUMMARY**

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

Synopsis:

House Joint Resolution 23 proposes amending the New Mexico Constitution to add a new section under Article V to create an independent ethics commission. The amendment would provide for the composition of the commission and qualifications and restrictions on membership, certain procedures for the commission, and removal procedures. The commission would have jurisdiction to investigate complaints alleging violations of standards of ethical conduct not covered by any laws concerning government conduct, personnel matters, or legislative or judicial ethics codes.

HJR 23 provides for penalties established by the legislature to be imposed by the commission, and grants rule promulgation and subpoena authority, as well as the ability to issue advisory opinions, to the commission. The amendment allows for the commission's determinations to be appealed to the district courts in a de novo review. Complaints received by the commission cannot be anonymous, and complaints and responses are confidential (exempting the records from inspection under the Inspection of Public Records Act) until either the response is filed or the date the response is due. Frivolous complaints may be subject to penalties of attorneys fees and costs against the filer, and penalties for complaints intended as harassment may be levied additional penalties.

HJR 23 proposes to submit the resolution to the legislature for approval at the next general or special election.

FISCAL IMPLICATIONS**SIGNIFICANT ISSUES**

HJR 23 provides a narrow yet undefined scope of jurisdiction for the proposed commission. Subsection J on page 4 provides a process for reviewing complaints, but it is not entirely clear what group or groups of people complaints can be filed against. The section provides that complaints include those "alleging violations of standards of ethical conduct not covered by any

laws concerning governmental conduct or personnel matters or by legislative or judicial ethical codes.” Use of terms such as “governmental conduct” without reference to a specific standing law like the Governmental Conduct Act or Gift Act, as well as “personnel matters,” will be difficult to interpret and may cause application and enforcement complications. Without language that includes who complaints can be directed at, it is not clear whether lobbyists, government contractors, or other individuals are subject to the jurisdiction of the commission. Additionally, by explicitly excluding ethical standards concerning legislative and judicial codes and governmental conduct (applying the Governmental Conduct Act this would include public officers, employees and any individual who violates the Act), it is not clear exactly what type of activities not already subject to penalties in current state law could possibly be available to the commission to receive complaints on and ultimately enact penalties for.

Subsection M on page 5 provides the commission with authority to award attorneys’ fees and costs against individuals who file “frivolous” complaints and also allows the commission to levy penalties for the filing of complaints “intended as harassment.” In addition to potential difficulties with a subject interpretation of frivolous, this subsection appears to extend the authority of the commission into criminal matters. Harassment is a criminal offense governed by NMSA 1978, Section 30-3A-2. The commission having authority to pursue penalties for a criminal offense may conflict with other language in HJR 23 that limits the scope and jurisdiction of the commission to ethics not covered by other laws, and that the commission can refer complaints to appropriate authorities to prosecute criminal violations. If HJR 23 intends to create a new civil cause of action for harassment then it should be clarified. Finally, this subsection also provides that the commission can only levy penalties against an individuals who files a complaint intended as harassment. Proving intent is high burden and may be difficult without significant investigation.

Subsection N on page 5 provides that the commission may recommend a matter to the legislature for consideration for impeachment proceedings. This provision may conflict with the stated scope of complaints that the commission may receive, which is limited to matters that do not include ethic standards concerning legislative and judicial codes.

PERFORMANCE IMPLICATIONS

Subsection G on page 3 provides offenses for which a commission may be removed, which include incompetence, neglect of duty, malfeasance in office, or partisanship. These conditions are not defined and subject to interpretation. Consideration should be given as to interpreting these terms and whether a reference such as “as prescribed by Board rule” may entice the commission to better define the terms in its own regulations.

Subsection J(4) on page 4 provides that the commission may issue advisory opinions. It may be presumed that these opinions would be limited to the scope of jurisdiction of the commission (ethics not already covered by current laws), which is very limited.

Administrative decisions with a statutory right to review by a district court are generally governed by Rule 1-074 NMRA, and deference is given to the decision of an administrative body when reviewed by the court. In HJR 23, a right to appeal is provided by Subsection K on page 5, which provides a de novo review “unless otherwise provided by law.”

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 80 – State Ethics Commission Act
SB 124 – State Ethics Commission Act
HJR 5 – Independent Ethics Commission, CA

TECHNICAL ISSUES

HJR 23 amends Article V of the Constitution. Article V is titled Executive Department and currently contains law that encompasses the Governor, Lt. Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and the Commissioner of Public Lands. The State Ethics Commission is identified as an independent state commission, and placing it under Article V may create unintended assumptions or implications.

Page 2 line 12 requires the commissioners appointed by the chief justice of the supreme court be licensed attorneys. It may be helpful to clarify whether this means they need to be licensed in NM and in good standing (a certificate of good standing can be obtained by the clerk of the NM supreme court).

Use of the term “member” should be changed to “commissioner” throughout the document for consistency.

Subsection C on pages 2 and 3 provides that a member of the commission shall serve until their successor is appointed and qualified. “Appointment” and “qualification” of the commissioners is confusing, as it is presumed that a person cannot be lawfully appointed unless that individual meets the requisite qualifications. Additionally, the “roll-over” appointment in Subsection C would allow for a person to conceivably serve indefinitely if a replacement is not appointed. It is not clear how this would affect the prohibition on serving more than two consecutive terms, as provided in Subsection D on page 3. For example, if a commissioner finishes their second consecutive term and a replacement is not appointed can that individual still serve until their successor is appointed, as stated in Subsection C, or will the prohibition of serving more than two terms prevent the individual from staying on the commission and thus creating an empty seat until the successor is appointed?

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS